

**UTAH JUDICIAL COUNCIL  
STANDING COMMITTEE ON MODEL UTAH CRIMINAL JURY INSTRUCTIONS  
MEETING MINUTES**

Judicial Council Room (Executive Dining Room), Matheson Courthouse  
450 South State Street, Salt Lake City, Utah 84114  
December 5, 2018 – 12:00 p.m. to 1:00 p.m.

<b>MEMBERS:</b>	<b>PRESENT</b>	<b>EXCUSED</b>	<b>GUESTS:</b>
Judge James Blanch, <i>Chair</i>	•		None
Jennifer Andrus		•	
Mark Field	•		<b>STAFF:</b> Michael Drechsel Jiro Johnson (minutes) Minhvan Brimhall (recording secretary)
Sandi Johnson	•		
Judge Linda Jones	•		
Karen Klucznik		•	
Judge Brendan McCullagh	•		
Stephen Nelson		•	
Nathan Phelps	•		
Judge Michael Westfall	•		
Scott Young		•	
VACANT – Criminal Defense Attorney			
VACANT – Criminal Defense Attorney			
VACANT – Criminal Law Professor			

**(1) WELCOME AND APPROVAL OF MINUTES:**

Judge Blanch welcomed the committee. The committee considered the minutes from the November 7, 2018 meeting. Mr. Phelps moved to approve the draft minutes. Judge McCullagh seconded the motion. The motion passed unanimously.

**(2) ASSAULT INSTRUCTIONS:**

Judge Blanch picked up where the committee left off on the assault instructions, beginning with Assault – Pregnant Person instruction. Ms. Johnson said that she was not present at the last meeting, but expressed concern about the change in wording regarding “the prosecution having proved beyond a reasonable doubt” that self-defense does not apply. Judge Blanch was concerned about the State v. Ramos decision, which caused Judge Blanch to want the instruction to be very clear who bears the burden of proof. Ms. Johnson pointed out that if the instruction only specifically states that the prosecution must disprove self-defense, it could call into doubt the burden for the other elements of assault. The committee agreed with that assessment. Judge Blanch proposed to the committee that the bracketed line in the elements instructions regarding defenses be changed to read,

~~“[That the prosecution has proven beyond a reasonable doubt that the defense of \_\_\_\_\_ does not apply.]”~~

The committee considered that change and agreed that it was better to proceed with the changed language for each of the assault instructions from the previous two meetings.

During the committee’s discussion of this topic, Ms. Johnson stated sometimes the bracketed defense language may be used to describe an imperfect self-defense that may result in a conviction for a lower level of offense (i.e., murder reduced to manslaughter). But there is another way to get to manslaughter that doesn’t necessarily involved a self-defense. That method is by use of a lesser included offense instruction (i.e., manslaughter as a “recklessly caused the death”). In such instances, the best approach may be to solve this problem through a special verdict form so that it is clear why a jury reached the verdict it did.

Judge McCullagh moved to adopt the Assault – Pregnant Person jury instruction as amended:

**CR \_\_\_\_\_ ASSAULT – PREGNANT PERSON.**

(DEFENDANT’S NAME) is charged [in Count \_\_\_\_\_] with committing Assault Against a Pregnant Person [on or about (DATE)]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT’S NAME);
2. Intentionally, knowingly, or recklessly
  - a. Attempted, with unlawful force or violence, to do bodily injury to (VICTIM’S NAME); or
  - b. Committed an act with unlawful force or violence that
    - i. caused bodily injury to (VICTIM’S NAME); or
    - ii. created a substantial risk of bodily injury to (VICTIM’S NAME); and
3. (VICTIM’S NAME) was pregnant; and
4. (DEFENDANT’S NAME) had knowledge of the pregnancy; and
5. [The defense of \_\_\_\_\_ does not apply.]

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

**REFERENCES**

Utah Code § 76-5-102(3)(b)

**COMMITTEE NOTES**

In cases involving domestic violence, practitioners should include a special verdict form and instructions defining cohabitant.

Utah appellate courts have not decided whether the cohabitant relationship between the defendant and the alleged victim is an element of the offense requiring proof of an associated *mens rea* (intentional, knowing, or reckless). Practitioners should review *State v. Barela*, 2015 UT 22.

Mr. Field seconded the motion.

The committee voted and unanimously approved the Assault – Pregnant Person instruction, as edited.

Judge Blanch then turned to the Aggravated Assault instruction. Judge McCullagh and Judge Blanch were concerned that the instruction is not titled as a Third Degree Felony as opposed to a Second Degree Felony for aggravated assault, which has different elements. Judge Jones preferred titling the instruction Aggravated Assault not Causing Serious Bodily Injury. Ms. Johnson stated that the element instruction between the F3 and F2 version of aggravated assault could be the same, and a special verdict form could be used to ask the jury whether they found that serious bodily injury or some other qualifying act did occur to make the aggravated assault a second degree felony. The committee discussed the procedures and practices used to submit special verdict forms to the jury. Ms. Johnson will prepare a bracketed special verdict form to address the circumstances outlined in Utah Code § 76-5-103(2)(a) and (2)(b) for review at the next meeting.

Judge McCullagh moved to adopt the Aggravated Assault instruction as amended, as follows:

**CR \_\_\_\_\_ AGGRAVATED ASSAULT.**

(DEFENDANT'S NAME) is charged [in Count \_\_\_\_\_] with committing Aggravated Assault [on or about (DATE)]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME);
2. Intentionally, knowingly, or recklessly
  - a. Attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or
  - b. Made a threat, accompanied by a show of immediate force or violence, to do bodily injury to (VICTIM'S NAME); or
  - c. Committed an act with unlawful force or violence that
    - i. caused bodily injury to (VICTIM'S NAME); or
    - ii. created a substantial risk of bodily injury to (VICTIM'S NAME); and
3. (DEFENDANT'S NAME)
  - a. [Used a dangerous weapon; or]
  - b. [Committed an act that impeded the breathing or the circulation of blood of (VICTIM'S NAME) by use of unlawful force or violence that was likely to produce a loss of consciousness by:
    - i. applying pressure to the neck or throat of (VICTIM'S NAME); or
    - ii. obstructing the nose, mouth, or airway of (VICTIM'S NAME); or]
  - c. [Used other means or force likely to produce death or serious bodily injury].
4. [The defense of \_\_\_\_\_ does not apply.]

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

**REFERENCES**

Utah Code § 76-5-103

**COMMITTEE NOTES**

Depending on the facts of the case, practitioners should include a special verdict form under the following circumstances:

- where there is "serious bodily injury" OR "loss of consciousness" (see Utah Code § 76-5-103(2)(a)); or
- where there is "targeting law enforcement officer" AND "serious bodily injury" (see Utah Code §76-5-103(2)(b)).

In cases involving domestic violence, practitioners should include a special verdict form and instructions defining cohabitant.

Utah appellate courts have not decided whether the cohabitant relationship between the defendant and the alleged victim is an element of the offense requiring proof of an associated *mens rea* (intentional, knowing, or reckless). Practitioners should review *State v. Barela*, 2015 UT 22.

Ms. Johnson seconded the motion.

The committee voted and unanimously approved the Aggravated Assault instruction, as edited.

**(3) HB 102 – USE OF FORCE AMENDMENTS:**

The Committee then moved to Defense of Self or Other. Back in March 2018, the committee had approved an instruction titled "Defense of Self or Other." Shortly thereafter, the Utah Legislature amended the Utah Code with H.B. 102, resulting in the need to revisit the committee's March 2018 instruction. Judge Blanch noted that the statutory amendment was to Utah Code § 76-2-402(2)(a)(ii), where the language "unless the use of force is a reasonable response to factors unrelated to the commission, attempted commission, or fleeing after the commission of that felony" had been added to the existing language in the statute. Judge Westfall then joined the Committee at 12:41pm. Judge Blanch focused on unusual circumstances in which use of force is acceptable when that force is not related to antecedent criminal conduct. Rather than changing the jury instruction it was proposed that a Committee Note be added to the language of the instruction that was approved on March 7, 2018. Judge Jones left the committee at 12:44pm.

Ms. Johnson moved to adopt the Committee Note for the Defense of Self or Other instruction, as follows:

**CR\_\_\_\_. DEFENSE OF SELF OR OTHER.**

You must decide whether the defense of Defense of Self or Other applies in this case. Under that defense, the defendant is justified in using force against another when and to the extent that the defendant reasonably believes that force is necessary to defend [himself] [herself], or a third party, against another person's imminent use of unlawful force.

The defendant is justified in using force intended or likely to cause death or serious bodily injury only if the defendant reasonably believes that:

1. Force is necessary to prevent death or serious bodily injury to the defendant or a third person as a result of another person's imminent use of unlawful force; or,
2. To prevent the commission of [Forcible Felony], the elements of which can be found under jury instruction [\_\_\_\_\_].

The defendant is not justified in using force if the defendant:

1. Initially provokes the use of force against another person with the intent to use force as an excuse to inflict bodily harm upon the assailant;
2. Is attempting to commit, committing, or fleeing after the commission or attempted commission of [Felony], the elements of which can be found under jury instruction [\_\_\_\_\_]; or
3. Was the aggressor or was engaged in a combat by agreement, unless the defendant withdraws from the encounter and effectively communicates to the other person the defendant's intent to do so and, notwithstanding, the other person continues or threatens to continue the use of unlawful force.

The following do not, by themselves, constitute "combat by agreement":

1. Voluntarily entering into or remaining in an ongoing relationship; or
2. Entering or remaining in a place where one has a legal right to be.

**REFERENCES**

Utah Code § 76-2-402(1) and (5).

**COMMITTEE NOTES**

Under circumstances where the use of force is a reasonable response to factors unrelated to the commission, attempted commission, or fleeing after the commission of that felony, the parties should consider modifying the language in subsection 2 regarding when the defendant is "not justified" in using force, to reflect Utah Code §76-2-402(2)(a)(ii).

Judge McCullagh seconded the motion.

The committee voted and unanimously approved the Defense of Self or Other instruction (with the newly added Committee Note), as edited.

**(4) OBJECT RAPE / DEFINITION OF PENETRATION:**

The Committee then turned to Object Rape / Definition of Penetration

Judge Blanch explained that the term "penetration" may need more explanation for what penetration means for Object Rape. There was discussion about adding a note clarifying or also citing to the *State v. Patterson* decision. Ms. Johnson raised a concern that if a separate definitional instruction were added that it may confuse practitioners and result in them adding penetration instructions to cases where the *Patterson* decision wouldn't apply such as child rape or other kinds of rape. Judge Blanch made it clear that *Patterson* focused narrowly on penetration for object rape and not other kinds of rape. A proposed committee note was drafted "For a definition of vaginal "penetration" for purposes of this instruction see *State v. Patterson* 2017 UT App 194 ¶13 (citing *State v. Simmons*, 759 P.2d 1152, 1154 (Utah 1988))."

Judge McCullagh moved to adopt the revised instruction (with the new committee note) for object rape, as follows:

**CR1607. OBJECT RAPE.**

(DEFENDANT'S NAME) is charged [in Count \_\_\_\_] with committing Assault [on or about (DATE)]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME)

2. Intentionally, knowingly, or recklessly caused the penetration, however slight, of ([VICTIM'S NAME][MINOR'S INITIALS])'s genital or anal opening, by any object or substance other than the mouth or genitals;
3. The act was without ([VICTIM'S NAME] [MINOR'S INITIALS])'s consent;
4. (DEFENDANT'S NAME) acted with intent, knowledge or recklessness that ([VICTIM'S NAME] [MINOR'S INITIALS]) did not consent; and
5. (DEFENDANT'S NAME) did the act with the intent to:
  - a. cause substantial emotional or bodily pain to ([VICTIM'S NAME] [MINOR'S INITIALS]); or
  - b. arouse or gratify the sexual desire of any person.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

**REFERENCES**

Utah Code § 76-5-402.2  
State v. Barela, 2015 UT 22

**COMMITTEE NOTES**

For a definition of vaginal "penetration" for purposes of this instruction, see State v. Patterson, 2017 UT App 194, ¶13 (citing State v. Simmons, 759 P.2d 1152, 1154 (Utah 1988)).

This instruction contains bracketed language which suggests optional language. Please review and edit before finalizing the instruction.

If there was a prior conviction or serious bodily injury, a special verdict form may be necessary. See SVF 1617, Sexual Offense Prior Conviction or SVF 1618, Serious Bodily Injury.

Mr. Field seconded the motion.

The committee voted and unanimously approved the Object Rape instruction (with the newly added Committee Note), as edited.

**(6) IMPERFECT SELF-DEFENSE INSTRUCTION:**

This matter was not considered by the committee during the meeting. It is anticipated that this matter will be addressed at the January meeting. Materials were provided to the committee staff for distribution at the next meeting.

**(7) ADJOURN**

Mr. Field had to leave at 1:03 p.m. Judge Blanch wanted the next committee hearing to focus on imperfect self-defense instructions. Ms. Johnson will provide materials for alternative special verdict forms. After the assault instructions, burglary and robbery will be addressed.

The Committee adjourned at 1:05 p.m.